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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 BNSF RAILWAY COMPANY,

11 Plaintiff,

12 v.

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14 CLARK COUNTY, WASHINGTON; MITCH
15 NICKOLDS, in his official capacity as Director
16 of Community Development of Clark County;
17 KEVIN A. PRIDEMORE, in his official
18 capacity as Code Enforcement Coordinator of
Clark County; and RICHARD DAVIUAU, in
his official capacity as County Planner of Clark
County,

19 Defendants.

No. 3:18-cv-05926

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22 CLARK COUNTY DEFENDANTS'
23 ANSWER AND AFFIRMATIVE
24 DEFENSES

25 Unless specifically admitted herein, Defendants deny each and every allegation in
26 Plaintiff's Complaint.
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29 **I. INTRODUCTION**

Defendants deny the allegations contained in Plaintiff's "Introduction," as they consist of
improper argument and legal conclusions. Moreover, Defendants are without knowledge as to
the truth of the factual allegations contained in the Introduction because Plaintiff has not yet
applied for a National Scenic Area Permit that would supply information regarding its project.

II. PARTIES

1. Defendants admit the allegations contained in Paragraph 1 of Plaintiff's Complaint.

2. With regard to the allegations in Paragraph 2 of Plaintiff's Complaint, Defendants admit that Clark County, Washington, is a municipal corporation formed and operating under the laws of the State of Washington.

3. Defendants admit the allegations contained in Paragraph 3 of Plaintiff's Complaint.

4. Defendants admit the allegations in Paragraph 4 of Plaintiff's Complaint.

5. Defendants admit the allegations in Paragraph 5 of Plaintiff's Complaint.

III. JURISDICTION

6. Defendants deny the jurisdictional conclusions and allegations contained in Paragraph 6 of Plaintiff's Complaint.

7. Defendants deny the jurisdictional conclusions and allegations contained in Paragraph 7 of Plaintiff's Complaint.

8. Defendants deny the jurisdictional conclusions and allegations contained in Paragraph 8 of Plaintiff's Complaint.

9. Defendants deny the jurisdictional conclusions and allegations contained in Paragraph 9 of Plaintiff's Complaint.

IV. VENUE AND INTRADISTRICT ASSIGNMENT

10. Subject to, and without waiving any jurisdictional defenses, Defendants admit the allegations contained in Paragraph 10 of Plaintiff's Complaint.

1 11. Subject to, and without waiving any jurisdictional defenses, Defendants admit the
2 allegations contained in Paragraph 11 of Plaintiff's Complaint.

3 **V. STATUTORY AND REGULATORY BACKGROUND**

4 **A. ICCTA**

5 12. Defendants deny the allegations contained in Paragraph 12 of Plaintiff's
6 Complaint because they consist of improper argument and legal conclusions.

7 13. Defendants deny the allegations contained in Paragraph 13 of Plaintiff's
8 Complaint because they consist of improper argument and legal conclusions.

9 14. Defendants deny the allegations contained in Paragraph 14 of Plaintiff's
10 Complaint because they consist of improper argument and legal conclusions.

11 **B. The Columbia River Gorge Compact**

12 15. Defendants deny the allegations contained in Paragraph 15 of Plaintiff's
13 Complaint because they consist of improper argument and legal conclusions.

14 16. Defendants deny the allegations contained in Paragraph 16 of Plaintiff's
15 Complaint because they consist of improper argument and legal conclusions.

16 17. Defendants deny the allegations contained in Paragraph 17 of Plaintiff's
17 Complaint because they consist of improper argument and legal conclusions.

18 **C. Clark County Unified Development Code**

19 18. Defendants admit the allegations contained in Paragraph 18 of Plaintiff's
20 Complaint.

21 19. With regard to the allegation contained in Paragraph 19 of Plaintiff's Complaint,
22 Defendants admit that, pursuant to the Columbia Gorge National Scenic Area Act, it has enacted

land use ordinances, codified as Clark County Code 40.420, for the National Scenic Area located in Clark County.

20. Defendants deny the allegations contained in Paragraph 20 of Plaintiff's Complaint because they consist of improper argument and legal conclusions.

21. Defendants admit the allegations contained in Paragraph 21 of Plaintiff's Complaint.

VI. STATEMENT OF FACTS

22. Defendants are without information or belief sufficient to admit or deny the allegations contained in Paragraph 22 of Plaintiff's Complaint and, therefore, denies the same.

23. Defendants are without information or belief sufficient to admit or deny the allegations contained in Paragraph 23 of Plaintiff's Complaint and, therefore, denies the same.

24. Defendants are without information or belief sufficient to admit or deny the allegations contained in Paragraph 24 of Plaintiff's Complaint and, therefore, denies the same.

25. Defendants are without information or belief sufficient to admit or deny the allegations contained in Paragraph 25 of Plaintiff's Complaint and, therefore, denies the same.

26. Defendants are without information or belief sufficient to admit or deny the allegations contained in Paragraph 26 of Plaintiff's Complaint and, therefore, denies the same.

27. Defendants are without information or belief sufficient to admit or deny the allegations contained in Paragraph 27 of Plaintiff's Complaint and, therefore, denies the same.

28. Defendants deny the allegations contained in Paragraph 28 of Plaintiff's Complaint because they consist of improper argument and legal conclusions.

29. Defendants admit that Defendant Daviau advised BNSF that a National Scenic Area Permit was required for BNSF's project in the Columbia River Gorge National Scenic

1 Area. Defendants deny the remaining allegations contained in Paragraph 29 of Plaintiff's
2 Complaint because they consist of improper argument and legal conclusions.

3 30. Defendants admit that, with regard to the allegation contained in Paragraph 30 of
4 Plaintiff's Complaint, on or about September 20, 2018, Defendant Pridemore informed BNSF
5 that it was required to obtain a National Scenic Area Permit for its project in the Columbia River
6 Gorge National Scenic Area.

8 31. Defendants admit the allegations contained in Paragraph 31 of Plaintiff's
9 Complaint.

10 32. Defendants admit the allegations contained in Paragraph 32 of Plaintiff's
11 Complaint.

13 **VII. NECESSITY FOR DECLARATORY AND INJUNCTIVE RELIEF**

14 33. Defendants deny the allegations contained in Paragraph 33 of Plaintiff's
15 Complaint because they consist of improper argument and legal conclusions.

16 34. Defendants deny the allegations contained in Paragraph 34 of Plaintiff's
17 Complaint because they consist of improper argument and legal conclusions.

18 35. Defendants deny the allegations contained in Paragraph 35 of Plaintiff's
19 Complaint because they consist of improper argument and legal conclusions.

20 36. Defendants deny the allegations contained in Paragraph 36 of Plaintiff's
21 Complaint because they consist of improper argument and legal conclusions.

24 **VIII. CAUSE OF ACTION – ICCTA Preemption**

25 37. Defendants incorporate their responses to the foregoing paragraphs as if fully set
26 forth herein.

1 38. Defendants deny the allegations contained in Paragraph 38 of Plaintiff's
2 Complaint.

3 **IX. AFFIRMATIVE DEFENSES**

4 By way of Further Answer, Defendants allege the following Affirmative Defenses:

5 FIRST AFFIRMATIVE DEFENSE
6 (Lack of Subject Matter Jurisdiction)

7 39. This Court lacks subject matter jurisdiction over this case.

8 SECOND AFFIRMATIVE DEFENSE
9 (Failure to State a Claim)

10 40. Plaintiff has failed to state a claim upon which relief may be granted.

11 THIRD AFFIRMATIVE DEFENSE
12 (Failure to Exhaust Administrative Remedies)

13 41. Plaintiff has failed to exhaust its administrative remedies.

14 FOURTH AFFIRMATIVE DEFENSE
15 (Estoppel)

16 42. Plaintiff's claims are barred by the doctrine of equitable estoppel.

17 FIFTH AFFIRMATIVE DEFENSE
18 (Waiver)

19 43. Plaintiff's claims are barred by the doctrine of waiver.

20 SIXTH AFFIRMATIVE DEFENSE
21 (Primary Jurisdiction)

22 44. Plaintiff's claims are barred by the doctrine of primary jurisdiction.

23 **IX. RELIEF REQUESTED**

24 WHEREFORE, County Defendants have fully answered Plaintiff's Complaint and,
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26 having set forth its defenses, pray for relief as follows:
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1. For dismissal of the Complaint with prejudice;

2. Such further relief as may be just and proper.

Dated this 5th day of December, 2018.

s/ Taylor Hallvik

Taylor Hallvik, WSBA #44963

Deputy Prosecuting Attorney

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Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2018, I electronically filed the foregoing *Clark County Defendants' Answer and Affirmative Defenses* with the Clerk of the Court using the CM/ECF system, which will send notification to the following:

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26 DATED this 5th day of December, 2018.

27 s/ Thelma Kremer
28 Thelma Kremer, Legal Secretary